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IN THE

SUPREME COURT OF THE UNITED STATES

SEPTEMBER, 1973

NO. 73-413

JOHN PAUL SHELTON
Petitioner
VS.
UNITED STATES OF AMERICA
Respondent

PETITION FOR WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

JOHN PAUL SHELTON, PETITIONER	
VERSUS	CASE NO.
UNITED STATES OF AMERICA, RESPONDENT	

PETITION FOR WRIT OF CERTIORARI

John Paul Shelton, Petitioner, prays for the issuance of a writ of certiorari to the United States Court of Appeals for the Fifth Circuit, to review an Order of that Court dated August 2, 1973, conditionally revoking petitioner's appeal bond in the above-styled case, and conditionally dismissing his appeal.

OPINIONS BELOW

The opinion of the Court of Appeals has not been officially reported. It is dated August 2, 1973, Case No. 73-1776 in the Court of Appeals. The judgment and sentence of the United States District Court for the Northern District of Georgia is not officially reported and no opinion was written. The District Court judgment is dated February 2, 1973, Case No. 27314 in that Court.

JURISDICTIONAL GROUNDS

(1) The date of the judgment and opinion of the Court of Appeals, and date same was entered, is August 2, 1973.

(2) No orders have been entered respecting a rehearing or extension of time.

(3) On August 15, 1973, the Court of Appeals entered an Order denying petitioner's motion for stay of mandate pending petition for writ of certiorari.

(4) The statutory provision conferring on this Court jurisdiction to review the judgment in question by writ of certiorari is *28 USC § 1254(1)*.

QUESTIONS PRESENTED FOR REVIEW

The court below ordered petitioner's criminal appeal bond conditionally revoked, and his appeal conditionally dismissed, solely upon unsworn allegations of Government counsel that petitioner, pending appeal, had become a fugitive in an unrelated state case. The Government's motions to revoke appeal bond, and to dismiss appeal, were not supported by affidavit, transcript, court record, or other document, certified or otherwise.

Petitioner's counsel filed a response to the motion to dismiss, alleging that petitioner had not violated the terms of his appeal bond, and that there was no evidence that he was, or is, a fugitive.

Petitioner had notice of the Government's motion to dismiss appeal, but did not have notice that the motion to revoke bail was to be presented to the Court for a ruling. Hence his response was addressed solely to the motion to dismiss appeal.

The questions presented for review are:

1.

Whether, upon the Government's application to revoke bail, the burden is on the Government to make a proper showing that it should be revoked, or on the accused to show why it should not be revoked.

2.

Whether, assuming the burden is on the Government, such burden was met by unverified allegations of Government counsel that petitioner had become a

fugitive on an unrelated state charge, where no affidavit, court record, transcript, or other document, certified or otherwise, was submitted to the Court in support of the allegation of fugitivity, and where petitioner did not admit the Government's allegations, but affirmatively averred that he had not violated the terms of his bond, and that there was no evidence that he was, or is, a fugitive.

3.

Whether the Court of Appeals could properly rule on the Government's motion to revoke bond, without first giving notice to petitioner that the motion was under consideration and would be ruled upon without oral argument.

4.

Whether the lower court, in remanding the cause to the District Court for further proceedings, should have decreed that the burden would be on the Government upon remand, instead of decreeing, as it did, that the burden would be on petitioner to "show cause why the conditional revocation of his bond and conditional dismissal of his appeal should not be made final".

5.

Whether, even if the Government's unverified allegations of fugitivity on an unrelated state charge were true, such alleged fugitivity would be ground for revoking the federal bond and/or dismissing the federal appeal, where no showing is made that the terms of the federal bond were breeched, or that petitioner had left the jurisdiction of the Fifth Circuit Court of Appeals.

6.

Whether the lower court had authority or jurisdiction to conditionally dismiss the appeal on the sole basis of unsworn allegations of Government counsel, unsupported by any record, that petitioner was a fugitive on an unrelated state charge.

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

1. The due process of law clause, and equal protection clause, of the Fifth Amendment.

2. Local Rule 6 of the United States Court of Appeals for the Fifth Circuit: "PRACTICE. Where not fixed by statute or rule the practice shall be that heretofore customarily followed in this court."

STATEMENT OF THE CASE

Petitioner was convicted by a jury in the United States District Court for the Northern District of Georgia for violation of the National Motor Vehicle Theft Act, and was sentenced to serve two concurrent terms of five years on February 2, 1973. Notice of appeal was filed March 5, 1973. The District Court granted Shelton release pending appeal on condition of $5,000.00 bond with surety. The appeal bond was executed April 6, 1973, by Shelton as principal, and by Wanda M. Clemons for Dependable Insurance Company as surety.

The appeal bond recites, in pertinent part:

"NOW, the condition of the above obligation is such, that if the said John Paul Shelton shall appear in the United States Court of Appeals for the Fifth Circuit, on the first day of the next term thereof, to be held in the city of New Orleans, Louisiana, or Atlanta, Georgia, and from day to day and from term to term thereafter until finally discharged therefrom, and shall abide by and obey all orders made by the said United States Court of Appeals for the Fifth Circuit, in said cause, and shall surrender himself in execution of the judgment and sentence appealed from as said Court may direct, if the judgment and sentence of the said District Court against him shall be affirmed by the said United States Court of Appeals for the Fifth Circuit, then the above obligation to be void, else to remain in full force, virtue, and effect."

The record on appeal was timely prepared, but by stipulation of the parties was retained in the District Court, where it remains at the present time, for

use of the parties in preparing briefs, pursuant to *Rule 11(c), Federal Rules of Appellate Procedure.* The case was timely docketed in the Court of Appeals, but the only record that was ever transmitted to that Court was a statement of docket entries.

Petitioner's brief on appeal was filed June 1, 1973. No brief on the merits has been filed by the Government.

On or about June 15, 1973, the Government filed in the Court of Appeals a "Motion to Dismiss Appeal". The alleged "facts" relied on by the Government for dismissing the appeal were not, and are not, contained in, or supported by, any transcript, record, document, paper, or other thing, but consist of the following naked, unsworn recitals by Government counsel in the body of the motion:

"On Tuesday, May 29, 1973, trial was commenced in Fulton Superior Court, Atlanta Judicial Circuit, in the case of the *State v. Paul Shelton*, Indictment No. A16925 (forgery) and on June 1, 1973, while the jury was deliberating his case, SHELTON escaped from the Fulton County Courthouse. A guilty verdict was returned, and SHELTON received a forty year sentence from the Honorable John Langford, Judge, Fulton Superior Court. SHELTON'S bond in connection with his state case was forfeited and a bench warrant was issued on that date. SHELTON is currently a fugitive from justice from the State of Georgia.

"In view of the above, the United States of America believes that the appellant has violated the terms of his appeal bond and has left the jurisdiction

of the Northern District of Georgia. The United States has this date filed a motion to revoke the appeal bond of appellant with the United States District Court for the Northern District of Georgia in criminal case number 27,314.

"WHEREFORE, it is respectfully requested that the appeal in this case be dismissed without prejudice to the appellant's right to re-open his appeal at some subsequent date".

The Government has never filed, in support of its motion to dismiss appeal, any affidavit, or any record, pleading, order, or other document from any state court or any federal court, with exception of an uncertified copy of the appeal bond, which Shelton executed in the instant case.

On June 18, 1973, the Clerk of the Court of Appeals mailed to Shelton a notice stating that the Government's motion to dismiss appeal had been received and filed, and would be presented to the Court for a ruling, together with any response filed by Shelton, on June 25, 1973.

Upon receipt of the above-mentioned notice, Shelton (who up to this time was representing himself on appeal) retained the undersigned counsel, who immediately sought, and obtained, an extension of time, to and including July 3, 1973, to file a response to the Government's motion to dismiss appeal.

While the motion to dismiss appeal was pending, the Government, on or about June 19, 1973, filed in the Court of Appeals a "Motion for Revocation and/or

Forfeiture of Appeal Bond", and served a copy of the motion on petitioner, by mail. The Court of Appeals, however, has never notified petitioner of the filing of the motion, or advised petitioner that the motion would be presented to the Court for a ruling on any particular date, or at any time whatsoever.

The Government's motion to revoke or forfeit appeal bond contains the following unsworn allegations by Government counsel, which are not supported by any transcript, record, paper, or other thing:

> "2. The Government also filed with the United States District Court for the Northern District of Georgia, a motion for forfeiture of the appeal bond on June 15, 1973, and a show cause order was issued that date directing SHELTON and his attorneys of record, Wesley R. Asinof and Charles R. Smith, to show cause on June 18, 1973, at 10:00 a.m., why the motion to revoke appeal bond should not be granted, by either producing SHELTON in Court or providing a satisfactory explanation that he has not violated the terms of his appeal bond. Messrs. Asinof and Smith advised the United States Attorney's Office that they did not wish to appear at this hearing since neither currently represents SHELTON on appeal, and neither has any information regarding his present whereabouts. It should be noted that Mr. Smith represented SHELTON in *State vs. John Paul Shelton*, Indictment No. A-16925 (forgery) in Fulton Superior Court, Atlanta Judicial Circuit, wherein SHELTON escaped from the Fulton County Courthouse while the jury was deliberating his case.

"3. SHELTON failed to make an appearance on June 18, 1973, but there was an appearance on behalf of Wanda M. Clemons for Dependable Insurance Company, Atlanta, Georgia, and the Honorable Charles A. Moye, Jr., United States District Judge, after considering the Government's motion for forfeiture of appeal bond, determined that according to the wording of the bond, this motion was more properly addressed to the Fifth Circuit Court of Appeals, and he lacked the jurisdiction to grant the relief requested by the Government. A copy of said appeal bond is attached hereto marked Exhibit "A" and made a part hereof.

"4. The Government is informed that SHELTON remains a fugitive from justice from the State of Georgia.

"WHEREFORE, the United States of America moves that SHELTON'S appeal bond in the sum of $5,000.00 be revoked and forfeited, and that this Court direct that a bench warrant issue for SHELTON'S arrest instanter on the grounds that it appears that SHELTON has absconded the jurisdiction of this Court and is in contempt of the authority of this Court, as well as the Fulton County Superior Court."

Counsel for petitioner then filed on or about July 3, 1973, a response in opposition to the motion to dismiss which averred that petitioner had not violated any of the terms of the appeal bond set in that case, that he had appeared promptly in the court below for arraignment, motions, trial and sentence, that he had diligently prosecuted his appeal, filed the nec-

essary briefs and denied that he had in any wise violated the terms of his appeal bond.

It does not appear that a copy of the motion to forfeit or revoke appeal bond was served on the surety, Wanda Clemons.

On August 2, 1973, the Court of Appeals handed down the Order which petitioner is now seeking to have reviewed on certiorari. Said Order conditionally revokes the appeal bond, and conditionally dismisses the appeal. The Court of Appeals further ordered that the cause be "remanded to the District Court which shall schedule a prompt hearing at which appellant shall appear in person (and with counsel, if he wishes) and show cause why the conditional revocation of his bond and conditional dismissal of his appeal should not be made final".

Petitioner on or about August 8, 1973 filed in the Court of Appeals a motion for stay of mandate pending application to this Court for writ of certiorari. On August 15, 1973, the Court of Appeals denied the motion for stay of mandate.

The jurisdiction of the Court of Appeals is based on 28 USC §3231.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

1.

The decision below is in conflict with the established rule that prevails in the United States Courts of Appeals for the Fourth Circuit, Ninth Circuit, and District of Columbia Circuit. This rule is: That once bail has been granted, and the Government seeks to have it revoked or modified, the burden of proof is on the Government to show by competent evidence why it should be revoked or modified, and not on a defendant to show cause why it should *not* be revoked or modified. In the instant case the Court of Appeals erroneously accepted as true the naked assertions of Government counsel that petitioner was a fugitive on an unrelated state charge, although said assertions were not sworn to or otherwise supported by any affidavit or document. Although the revocation of bond was "conditional", the Court below decreed that upon remand to the District Court for further proceedings, the burden would be on *petitioner* to show cause why the conditional order of the Court of Appeals should not be made final. The decision below, insofar as it shifts the burden of proof to petitioner, is in conflict with the following decisions of other Circuits:

(a) In *Christoffel v. United States* 196 F 2d 560, at page 566, (Dist. of Col. 1951) the Court, in denying the Government's motion to revoke or modify a criminal appeal bond, held:

> "8. The Courts have, of course, power to revoke an order admitting to bail . . . . But neither revocation of an order admitting to bail nor modi-

fication of the terms thereof is to be arbitrarily done. *Proper showing* of a reason for revocation or modification must be made." (Emphasis by brief writer).

(b) In *Rhodes v. United States* 275 F 2d 78, 80, (4 Cir. 1960) the Court held that the burden of proof is on the Government where it opposes applications for bail (citing Justice Frankfurter's Memorandum Opinion in *Ward v. United States*, 76 S Ct 1063, 1065, 1 L Ed 2d 25).

(c) In *Bridges v. United States* 184 F 2d 881, (9 Cir. 1950) the Court of Appeals, setting aside an order revoking bail, held that the burden was on the Government to show cause for revoking bail, and that the Government had not met its burden.

(d) In *Drew v. United States* 384 F 2d 314, 315, (Dist. of Col. 1967) the Court followed its own decision in *Christoffel v. United States, supra*, and held that before an order admitting to bail can be revoked or modified, a "proper showing of a reason for revocation or modification must be made".

2.

The Court below, in conditionally revoking appeal bond and conditionally dismissing appeal on basis of unsworn allegations of Government counsel which were not admitted by petitioner, and decreeing that upon remand to the District Court the burden would be on petitioner to show cause why the order of the Court of Appeals should not be made final, has abridged the due process clause of the Fifth Amendment, and has so far departed from the usual practice and course of judicial proceedings in bail revocation

cases as to call for the exercise of this Court's supervisory power.

3.

The decision below is in direct conflict with the decision of the United States Court of Appeals for the Ninth Circuit in the case of *Lannom v. United States* (CA Cal. 1968) 401 F 2d 504, where the Court denied the Government's motion to dismiss an appeal from conviction as moot on ground that defendant had jumped bail and was a fugitive.

ARGUMENT

Petitioner has been unable to find any case where a Court of Appeals revoked an appeal bond, or dismissed an appeal, either conditionally or finally, in a case where the fugitivity complained of involved another court, in a state jurisdiction, in an unrelated case, and where the only showing of fugitivity was the naked assertion of Government counsel, unsupported by any affidavit or court record or other document whatsoever.

The court below cited in its opinion and erroneously relied upon the following cases, all of which are distinguishable in that they involved situations where the defendants had absconded or jumped bail or escaped in the very case under appeal, and the fact of their fugitivity was conceded by their counsel:

In *Molinaro v. New Jersey*, 396 U.S. 692, 24 L Ed 2d 586, this Court dismissed an appeal from a state court, upon an uncontroverted showing that the state court had revoked Molinaro's bond in the very case under consideration, and upon admission by defense counsel that Molinaro was indeed a fugitive.

In *Eisler v. United States*, 338 U.S. 189, 93 L Ed 1897, dismissed 338 US 883, 94 L Ed 542 (1949), this Court dismissed a petition for certiorari upon an uncontroverted showing that Eisler had fled to Great Britain, and efforts to extradite him had been unsuccessful. Eisler was a fugitive on the very charge under appeal.

In *Smith v. United States*, 94 US 97, 24 L Ed 32

(1876), this Court dismissed a writ of error where it was "admitted that the plaintiff in error has escaped, and is not within the control of the court below, either actually, by being in custody, or constructively, by being out on bail."

In *Johnson v. Laird*, 432 F 2d 77 (CA 9, 1970), an Army serviceman was seeking release by habeas corpus from the Army as a conscientious objector. The District Court denied relief and Johnson appealed. Upon oral argument of the appeal, the Court was informed without contradiction that Johnson had deserted from the Army, and was out of the country.

In *United States v. O'Neal*, 453 F 2d 344 (CA 10, 1972), the record showed, at time of oral argument of the appeal, that the District Court had forfeited O'Neal's appeal bond and issued a bench warrant. The record showed that O'Neal was a fugitive on the very case under appeal. The Court in conditionally dismissing the appeal stated: "At argument on the motion to dismiss there was no dispute asserted by appellant's counsel as to these record facts."

In *United States v. Dawson*, 350 F 2d 396 (CA 6, 1965) the defendant fled the jurisdiction of the District Court, and the District Court forfeited the bond. As of date of oral argument, Dawson had not been apprehended. He was a fugitive, with bond forfeited, on the very charge under appeal.

The unreliability of the unsworn allegations of Government counsel with respect to petitioner's alleged fugitivity is apparent from the contradiction contained therein. Government counsel alleges first

that petitioner "escaped" from custody, then alleges that his bond was forfeited. These allegations are incompatible, as a defendant would not be on bond if he was in custody, and vice versa. A defendant could escape from custody, or jump bail while on bond, but Government counsel has not explained how he could do both simultaneously on the same charge.

With respect to the Government's motion to revoke appeal bond, petitioner had no notice that the motion was to be ruled upon without oral argument, or that it was to be considered by the Court at all. It is the practice of the Court of Appeals to notify a party when a motion of substance has been made, so that he may respond and oppose the motion. Such notice was given to petitioner with respect to the motion to dismiss appeal, but not with respect to the motion to revoke bond. While there appears to be no rule of court or statute specifically requiring notice in the case of motions in the courts of appeals, the Fifth Circuit has Local Rule 6, which provides:

> "Where not fixed by statute or rule the practice shall be that heretofore customarily followed in this court."

As evidenced by the notice of motion given to petitioner in connection with the motion to dismiss appeal (which was filed prior to filing of the motion to revoke appeal bond), it is the practice of the Court of Appeals to serve notice of a motion on a party, where his substantial rights are affected. The petitioner did not respond to the motion to revoke bond because he had no notice it was to be ruled upon. Petitioner's rights to due process of law under the Fifth Amendment, and Local

Rule 6 of the Fifth Circuit, were abridged when the Court ruled on the motion to revoke bond without prior notice to petitioner.

When additional bail is sought by the Government in a criminal case, 18 USC 3143 requires that "proof" shall be made to the judge that the defendant is about to abscond. This statute would seem to require, also, that when the Government seeks to have a bond revoked, the Court should require "proof" of circumstances justifying revocation. And it is clear that due process requires as "proof" something more than naked assertions of Government counsel, unsupported by affidavit or by any other document or record.

CONCLUSION

For the foregoing reasons it is submitted that the writ of certiorari should issue.

Respectfullly submitted

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CERTIFICATE OF SERVICE

I have served copies of the foregoing Petition for Writ of Certiorari upon John W. Stokes, Jr. and Eugene A. Medori, United States Attorneys by personal delivery thereof at their office at the Old Post Office Building, Atlanta, Georgia.

This Sept. 4, 1973.

WILLIAM V. HALL, JR.
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